STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2003
v	No. 239899 St. Clair Circuit Court
THEODORE ALEXANDER ZADROZNY, Defendant-Appellant.	LC No. 01-002688-FH

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of three counts of attempted kidnapping of a child under the age of fourteen by enticement, MCL 750.350, and one count of accosting a child for an immoral purpose, MCL 750.145a. Defendant was sentenced to twenty-three to sixty months' imprisonment for the attempted kidnapping convictions and 365 days' imprisonment for the accosting conviction, the terms to run concurrently, with credit for 142 days served. We affirm.

Defendant first argues that his prior conviction for indecent exposure should not have been admitted. We disagree.

We review for an abuse of discretion a trial court's decision to admit evidence of other acts. *People v Sabin (On Remand),* 463 Mich 43, 60; 614 NW2d 888 (2000). MRE 404(b) governs admission of evidence of other-acts evidence. Before other-acts evidence may be introduced, the prosecutor must satisfy a three-part test: (a) there must be a reason other than character or propensity for its admission, (b) it must be relevant, and (c) the danger of undue prejudice cannot substantially outweigh its probative value, especially where there are other means of proof. *Id.*

In the present case, the prosecutor proposed to introduce defendant's prior conviction for indecent exposure to show motive and intent, both proper purposes under MRE 404(b). Evidence is relevant when it has a tendency to make a material fact more or less probable. *Sabin, supra* at 60. Relevance involves two elements, materiality and probative value. *People v Crawford,* 458 Mich 376, 388; 582 NW2d 785 (1998). Materiality refers to whether the fact was truly at issue. *Id.* Motive is the reason for doing an act and is relevant to show specific intent. *Sabin, supra* at 68-69. Specific intent to commit a crime is required to prove criminal attempt. *People v Kimball,* 109 Mich App 273, 278-279; 311 NW2d 343 (1981). Therefore, intent was at

issue because a plea of not guilty requires the prosecution to prove every element of the offense. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972).

Where other-acts evidence is offered to show intent, the acts must be of the same general category to be relevant. *People v VanderVliet*, 444 Mich 52, 80; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prior conviction was of the same general category where defendant initiated the conversations and targeted young people who did not know him. While the conversations leading to the kidnapping charges occurred in the afternoon, defendant offered to take the girls to the movies – a dark location – similar to the circumstances surrounding the prior act, which occurred at night.

Unfair prejudice exists when there is a tendency that the evidence will be given too much weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). While the court did not weigh the prejudicial effect of the prior incident against its probative value on record, it considered the arguments offered by both parties before making a determination. Whether other-acts evidence is more prejudicial than probative is best left to the contemporaneous assessment of the trial court. *Sabin, supra* at 71. In addition, the trial court limited the prejudicial effect of the prior conviction by instructing the jury about its limited purpose. Therefore, we find no error.

Defendant next claims he was denied a fair trial because he was unable to prepare a proper defense where the trial court violated the MRE 404(b)(2) notice requirement. We disagree.

Defendant must receive notice some time before the prosecutor introduces prior acts evidence. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). The purposes of the 404(b)(2) notice requirement are:

> (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes evidence and is grounded in an adequate record. [*Hawkins, supra* at 454-455.]

Therefore, the prosecutor's failure to provide notice was plain error. *Hawkins, supra* at 455. Nevertheless, while failure to give MRE 404(b)(2) notice is plain error, it does not always require reversal, *id*., particularly where, as here, evidence was admissible and defendant had actual notice sufficient to prepare a defense. Like the defendant in *Hawkins, supra* at 455-456, defendant has not demonstrated how he would have proceeded differently if the prosecutor had given him technically proper notice. The testimony of the six unchallenged witnesses was sufficient to convict defendant, and any error did not result in a miscarriage of justice. See *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Thus, the error, the prosecution's failure to provide notice, does not require reversal.

Defendant next argues that the prosecutor presented insufficient evidence of intent to conceal or detain to convict him under MCL 750.350. We disagree.

An insufficient evidence claim is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Evidence must be viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979).

Intent may be inferred from the surrounding facts and circumstances, *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748, amended 441 Mich 1201 (1992), and because it is difficult to prove state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Ten witnesses testified that defendant asked them to accompany him to the movies – a dark, secluded environment – indicating an intent to conceal his victims from other people, including parents. Because the victims were not old enough to drive, they would likely have been detained until defendant decided to return them. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Therefore, defendant's argument fails. Upon a de novo review, when the evidence is viewed in a light most favorable to the prosecution, the evidence was sufficient to convict defendant under MCL 750.350.

Defendant next claims the trial court should have severed the different counts. We disagree.

A court's determination whether to sever is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Offenses are severable by right when the offenses are unrelated. MCR 6.120(B). However, offenses are related when they indicate a single scheme or plan. MCR 6.120(B)(2). In the instant case, the felony offenses involved a series of attempts to convince young girls to accompany defendant, using free movie tickets, and in one instance cash, as enticement, committed around late August, early September. Because defendant used the same enticement to lure his victims, the offenses were related. *People v Tobey*, 401 Mich 141, 151; 257 NW2d 537 (1977). Because each offense involved an attempted kidnapping of a girl under fourteen within a short period of time, they indicated a single scheme or plan. *Id.* at 151-152. The misdemeanor offense was, also, arguably part of defendant's plan to subject his victims to an immoral purpose. Therefore, there was no right to mandatory severance.

Severance is permissible if it promotes a fair determination whether a defendant is guilty or innocent. MCR 6.120(C). Here, however, had severance been granted, it is likely that the evidence of each offense would have been admissible under MRE 404(b). Where evidence of one offense would have been admissible to prove intent in a trial for another offense, a trial court's decision not to sever the two offenses is not an abuse of discretion. *Duranseau, supra* at 208. Thus, the trial court did not abuse its discretion by not severing the different counts.

Defendant finally argues that the prosecutor inappropriately commented on defendant's character during closing argument. We disagree.

Defendant did not challenge the prosecution's comments during closing argument at trial, and thus, this issue is not preserved. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Reversal is

warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id*. at 721. Defendant argues that the prosecutor inappropriately commented on defendant's character when she argued that defendant's prior conviction indicated he had no second thoughts about acting inappropriately in public, and that he did so in the instant case.[1] During closing argument, the prosecutor stated:

> We heard that the defendant . . . last year was found underneath the Blue Water Bridge area on these rocks by two young people. . . . And you heard from Miss McGuffin that when she saw him on this particular night when Officer Krikorian came to the scene, that she saw him undressed and she saw him touching himself, and she . . . . was 17 at the time when this happened. . . .
>
> She said a couple days . . . before she was there with one of the same people and another friend, and that they had been talked to by this defendant. And what did he say? You want to go party or you want to have some fun? And teenagers, thinking that included alcohol and someone to buy, were interested. What do you mean? You know, real fun. Yeah. What's that? Something kinky. . . .
>
> It was only the second time they saw him a couple, three days later when he's masturbating naked on the rocks underneath the Blue Water Bridge, that they say this is over the top. This is now the time we have to call.
>
> What does that really demonstrate? I mean, you all have reason, logic, and common sense, and you know certain things. I think based on the testimony there's some reasonable conclusions you can draw.
>
> Clearly, this defendant has no real boundaries. And what I mean by boundaries, it doesn't appear that he has any compunction or hesitation about doing things that most people would view as out of bounds. Here's a person who at 11:00 o'clock [sic] at night in November, not for a midnight swim with the Polar Beer [sic] Club, strips down naked, and masturbating, for heaven's sake. Now, here's a person who has no compunction or hesitation to be doing that out in public where people can happen on him. Which is exactly what happened here.
>
> You have a circumstance where two days earlier he had invited them to get kinky with him. Didn't appear to work on the 17-year-olds. So within the year he's back at it. This time on a newer, younger model. He had stepped up

[1] We note that defendant has not cited any cases supporting his position that comments regarding MRE 404(b) evidence constitute prosecutorial misconduct. "'Defendant may not leave it to this Court to search for the factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

> this lack of boundaries. His behavior becomes more intense. His behavior becomes more threatening. So what does he do?
>
> Now he's trolling the area where you'd expect to find children at middle schools and video stories [sic] and at the mall, and now what's he trying to do? Is he offering to take them home? Is he offering to come over and have Sunday dinner with the family? Is he offering to be part of their church, family, or their social circles? No. He's wanting them – to take them away to a quote, unquote, "movie." He doesn't want them where they're at. He needs to take them away.

"Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schutte, supra* at 721. A prosecutor may argue reasonable inferences developed from the evidence as it relates to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But "[e]vidence of prior bad acts is never admissible to show a defendant's character or to show that he acted in conformity with that character." *People v Fisher*, 193 Mich App 284, 290; 483 NW2d 452 (1992). It was impermissible to argue that defendant was acting in conformity with character. See MRE 404(b). Nevertheless, the reference to defendant's character was brief and could have been cured had an instruction been requested. Where prejudice caused by unchallenged closing remarks about a defendant's character could have been eliminated by a curative instruction, appellate review is precluded. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996); see also *Schutte, supra*. Moreover, any error was cured when the jury was instructed that evidence of other crimes or bad acts was to only be used for a limited purpose and not to show defendant was a bad person likely to commit crimes. Consequently, no error exists requiring reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood